MHR Connections

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THE MANITOBA HUMAN RIGHTS COMMISSION

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Equality of Opportunity and Freedom from Discrimination

School division salutes Pasternak twins for strength and courage

They didn't make the boys' hockey team, but Amy and Jesse Pasternak gained the respect of their school and school division. In a written statement Superintendent of Seven Oaks School Division Brian O'Leary wrote that their school and school division "salute Amy and Jesse Pasternak for the strength and courage they displayed in asserting their right to try out for the team. They should not have been denied that opportunity on the basis of their gender." The identical twins, who are now grade twelve high school students, last week won a human rights case allowing them, for the first time, to try out for the boys' team.

Amy and Jesse Pasternak facing the media. (Courtesy of CTV Winnipeg)

In 2004, when they were in grade ten, Amy and Jesse filed a complaint with the Manitoba Human Rights Commission when they were not allowed to try out for the boys' hockey team. According to the rules of the Manitoba High School Athletics Association, which regulates high school sports in the province, if a girls' team is available, girls can not try out for the boys' team. At the Pasternak's school, a girls' team had started up that year. In other schools, where no girls' team exists, girls continued to try out for the boys' team.

Joke statement misquoted

The human rights hearing into their complaint began in June, 2006 with the media attention escalating and reaching national levels of interest. The girls were subsequently subjected to both negative media and public opinion. Much of the controversial coverage of the hearing was based on media reports that one of the girls testified that the girls' team was a joke. In actual testimony, Jesse stated that *a girls' exhibition game was a joke.* She further explained that unlike boys' exhibition games, which are competitive, no one kept score and there were managers and coaches on the ice helping the girls out.

At the conclusion of the hearing, Jesse said, "You read others' opinions, but you tough it out."

Commission Counsel Sarah Lugtig said "that it was unfortunate that the media and public debate focused on many unfounded fears instead of the more important human rights concern – that of barring females from participating in traditionally male activities, in this case contact hockey."

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The Rights Connection
By Janet Baldwin - Chairperson

Finding the Rights Balance

One of our more challenging tasks is applying *The Human Rights Code* to cases where different human rights protections appear to be in conflict. An illustration of how protections from discrimination on the basis of religion and the basis of sex (including pregnancy or circumstances related to pregnancy) may come into conflict is the sale of Plan B, also known as the morning-after pill. Last year Health Canada approved non-prescription sales of this drug, which is used to avoid pregnancy following unprotected sex. Some pharmacists whose religious beliefs prohibit such means to avoid pregnancy have refused to provide customers with Plan B.

Last year, the Ontario Human Rights Commission released a publication which provides an analytical framework for balancing conflicting rights. Two models presented are pragmatic balancing, which tries to find a compromise between competing interests, and principled balancing, which emphasizes the intent of the human rights legislation and sets out the scope of each right in a manner that avoids conflict as much as possible.

Applying these approaches to the Plan B example, the pragmatic balancing approach might explore whether there is always another pharmacist on duty who does not have religious objections to providing Plan B, and whether a workplace practice could be put in place that provides service to customers requesting Plan B in a non-discriminatory manner, but does not require the pharmacist with religious objections to provide the service. The principled balancing model might explore what service the customer requesting Plan B is entitled to, and to what extent the pharmacist's religious beliefs must be accommodated.

In practice, the Commission is likely to apply a pragmatic approach in its attempts to mediate or in its analysis of the complaint, but if a compromise cannot be found between competing interests, it will rely on a purposive and contextual approach to *The Code* to prevent discrimination.

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Nonetheless a readers poll taken by the Winnipeg Free Press within days after the decision, indicated that 63% of its readers agreed with the human rights ruling allowing the Pasternak twins to try out for their high school boys' hockey team. Thirty-five per cent voted "no."

Over the course of time at least one media columnist changed her mind. On June 28, 2006 Winnipeg Free Press columnist Lindor Reynolds wrote that "Amy and Jesse Pasternak are coming off as a pair of spoiled brats who need a time out." On September 28, six days after the decision was released, she conceded that she was wrong and wrote, "The Pasternaks won, although they paid a high price for it. They did it in full glare of the media with people like me lobbing grenades at them. The fact that they still laced up and tried out for the boys' team speaks volumes about their character."

The Decision

In her written decision, released on September 22, 2006, Adjudicator M. Lynne Harrison found that the Manitoba High School Athletics Association was not justified in requiring that girls play on girls' teams nor was it justified in refusing to let the girls try out for the boys' team. She wrote, "I find that the MHSAA contravened Section 13 of *The Code* by subjecting the complainants to differential treatment based on their gender."

> *"There were many opportunities to resolve the complaint before it went to adjudication ..."*
> *Sarah Lugtig*

According to Ms Lugtig, the Association was provided with an independent investigator's report revealing that there were clear legal precedents in the girls' favour. She added that "there were many opportunities to resolve the complaint before it went to adjudication, but the Association chose instead to use the adjudication process and defended their rule vigorously." Adjudicator Harrison however, found that the MHSAA had not succeeded in justifying its position and based her decision on past precedents in other provinces, both for hockey and other sports.

In its own media release after the decision, the MHSAA asked a series of questions including: Does this mean that boys can try out for girls' teams; do we eliminate gender specific teams; and how will this affect female participation?

Lack of evidence

Adjudicator Harrison however, found that there was no objective evidence that women's hockey would suffer, that boys would take over girls teams or that boys would end up being disadvantaged as a group when it comes to opportunities to play hockey. She cited the Blainey case as an example. In 1988 Justine Blainey fought and won the same issue when the Ontario Women's Hockey Association prohibited her from playing for a mens' team. Similar concerns were expressed at that time. Adjudicator Harrison wrote that she "expected to hear evidence to indicate that such concerns had been shown to be justified over time." She noted that this evidence was not introduced.

Ms Lugtig also explained "that the adjudicator's ruling has no impact on the Association's ability to maintain girls' only teams. That aspect of the rule was not at issue." She added that "minor hockey hasn't had a problem with boys wanting to play on girls' teams and they have let girls try out and play on the boys' teams for many years."

She agreed that if a boy wanted to challenge his exclusion from a girls' team, he could also file a complaint with the Commission. She added however, that there may be valid reasons for having girls' only teams or they may qualify as a special program, which means these teams are protected under *The Code*. This has been found in other provinces.

A special program is one which aims to advance equality of opportunity for a historically disadvantaged group. Even though such a program treats people differently on the basis of sex or race or disability, *The Code* makes it clear this is not discrimination.

When asked if it was worth going through the adjudication process and the media scrutiny, even if they did not make the team, Amy replied, "It was definitely worth it. It's worth it for the young girls that we've coached in the past. It's worth it for girls coming up in the hockey program."

Adjudicator Harrison has ordered that the MHSAA remove its requirement that girls try out and play for the girls' hockey team if the school has a girls' hockey team, that Amy and Jesse Pasternak receive one-on-one coaching for loss of skills and one session of hockey camp appropriate to their age and skill, and that each receive a sum of $3500.00 to compensate for injury to their dignity and self respect.

The complete decision is on the Commission's website: www.gov.mb.ca/hrc

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2006 Winnipeg Accessibility Award Winners
•The Manitoba Cardiac Institute (Reh-Fit) Inc.
•ACCESS Transcona - Stantec Architecture Ltd.
•Lord Roberts School Playstructure - Crozier Agencies
•The Hellstrom Home
Honourable Mention: 125 Carriage Road Apartment Complex – Manitoba Housing Authority/MCM Architects

The Lord Roberts Play Ground Committee toured the city to find out what kids liked best in their playstuctures. Then with the help of Crozier Agencies, an accessible structure was designed and built in the spirit of inclusion.